

1989

# Bernard McGuire v. Industrial Commission of Utah : Reply to Brief in Opposition

Utah Supreme Court

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BRIEF

890076

THE INDUSTRIAL COMMISSION OF UTAH

SUPREME COURT

Case No. 8/BK00552 and 87A3544

BRIEF

Court of Appeals No. 880057-CA

IN THE UTAH SUPREME COURT

DOCKET NO. \_\_\_\_\_

BERNARD MC GUIRE

Employer/Appellant,  
Petitioner,

vs.

INDUSTRIAL COMMISSION OF UTAH

Respondent.

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:  
: PETITIONER'S REPLY BRIEF  
:  
:  
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: Case No. 890076  
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FILED  
MAY 1 1990

Clerk, Supreme Court, Utah

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THE INDUSTRIAL COMMISSION OF UTAH

Case No. 87BR00552 and 87A3544

Court of Appeals No. 880057-CA

IN THE UTAH SUPREME COURT

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|-------------------------------|---|--------------------------|
| BERNARD MC GUIRE              | : |                          |
|                               | : |                          |
| Employer/Appellant,           | : | PETITIONER'S REPLY BRIEF |
| Petitioner,                   | : |                          |
|                               | : |                          |
| vs.                           | : | Case No. 890076          |
|                               | : |                          |
| INDUSTRIAL COMMISSION OF UTAH | : |                          |
|                               | : |                          |
| Respondent.                   | : |                          |

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IN THE UTAH SUPREME COURT

Respondent.

PETITIONER'S REPLY BRIEF

Case No. 890076

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### Questions for Review

1. Was petition for Writ of Certiorari filed 30 days after issuance of Court of Appeals decision, as required by Rule 45, Rules of the Utah Supreme Court?

2. Did the respondent correctly cite the Part C requirement of the ABC test?

### Statement of Case

The Appeals decision was issued February 3, 1989. Thirty days later was March 5, 1989 (Sunday). On March 6, the Writ was filed, the fees paid, and three copies mailed to Respondent, but because of copying errors, the papers were lodged pending correction of errors within 5 days. Two days later, on March 8, the copying errors (i.e., Rule 27(a)(1)-(3), spiral binding, one-sided copying) were corrected and substituted for the original petition which had been held. At that time the lodged complaint was considered to have been filed on March 6.

The Respondent argued in his brief that independent contractors must be independently established, and it makes no difference that the trade and job are recognized as independent.

### Argument

1) The Clerk of the Court "will refuse any petition for a Writ of Certiorari which is jurisdictionally out of time." Rule 45(b) R. Utah S.C.

The Clerk of the Court shall have the duty of entering chronologically all process, orders and opinions in the docket on the papers assigned to the case, Rule 39(b), Supra.

The Clerk of the Court, in examining all pleadings, may require counsel to substitute for any pleadings or papers "original pleadings or other papers prepared in conformity with this subdivision." URCP 10(d) adopted to the extent not inconsistent with Utah Supreme Court Administrative Orders "Order re: Rules of Procedure and Evidence to be Used in the Courts of this State filed September 10, 1985. [See also URCP 1(a)].

The Clerk of the Court lodged one copy of the petition on March 6, and on March 8 certified that March 6 was, indeed, the filing date.

Respondent admits that a March 6 filing "would have constituted a timely filing." Respondent's Brief, Page 8, Lines 1-4. Because the Petition was filed on March 6, it was timely filed.

2) The cases cited by Respondent do not assert the proposition that employees must, in fact, be established in an independent business.

In the *Leach* case cited by the Respondent (Page 10 of Respondent's brief), the issue was whether "Franchise Dealers" who had the exclusive right to solicit business for a window retailer and whether "contract installers" who installed the windows were employees. The court said they were not. They were not licensed contractors, self-employed carpenters nor did they have a business to fall back on if they were discharged. They could not sell or install the specialty windows of others.


In *New Sleep*, (p. 291), installers of water beds were also found to be employees because none of the following helpful but not necessary factors were present: Holding out to the public, some clientele, a place of business, advertising, a license, any significant skill or apprenticeship required, any tools necessary to

do the work, or any evidence of actively seeking installation work from the general public.

In *Barney Drywall*, the court found that journeyman, unlicensed finishers and nailers were not employees of a drywaller because they worked for other contractors on the same basis as admitted apprentice employees of the drywaller. The court said that once the apprenticeship with the drywaller was over, they were "free to work or not as they choose and to perform services for any number of contractors or private persons." This illustrates the prospective power of employees to be independent contractors de jure if not defacto.

Our case involves professional, licensed nurses performing unsupervised services for which they could be sued for malpractice, have disciplinary action taken against them by regulatory agencies, or have their actions countermanded by doctors. This is a tough case, and comparison to window salesmen and water bed installers is inappropriate. The test is whether employees are customarily engaged in an independently established trade. As we quoted in *North American, Inc. v. Unemployment Comp.*, 22 Utah 2d. 338, 453 P.2d 142, 145 (1969) the test is "whether or not such services were an independently established trade, occupation, profession or business." (Emphasis added.)

DATED this 3rd day of May, 1989.

  
\_\_\_\_\_  
JOHN J. BORSOS  
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CERTIFICATE OF MAILING

I certify that a true and correct copy of the foregoing  
Petitioner's Reply Brief was mailed postage-prepaid, to K. Allan  
Zabel, Special Assistant Attorney General, Attorney for Respondents,  
P. O. Box 11600, Salt Lake City, Utah 84147, this 3rd day of May,  
1989.

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